# Muhammad Jailani bin Kasim v Timbalan Menteri Keselamatan Dalam Negeri, Malaysia & Ors

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–34 OF 2006(J)
AHMAD FAIRUZ SHEIKH CHIEF JUSTICE, ALAUDDIN AND AUGUSTINE PAUL FCJJ
27 JULY 2006

*Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Inquiry officer, report of — Defective report — Detention order of Minister based upon such report — Whether detention order valid*

*Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Inquiry officer, report of — Qualifications of inquiry officer not stated — Conclusions relating to inquiry not stated — Whether tantamount to non-compliance with statutory requirements — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 s 5*

*Preventive Detention — Detention order — Detention under Dangerous Drugs (Special Preventive Measures) Act 1985 — Judicial review of — Irregularities leading to the making of detention order — Whether court could inquire into such irregularities — Dangerous Drugs (Special Preventive Measures) Act 1985 s 11C(1)*

The appellant was arrested pursuant to s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The Deputy Minister of Internal Security thereafter issued a detention order against the appellant under s 6(1) of the Act. The appellant filed a writ of habeas corpus but it was dismissed by the High Court. The appellant thus appealed to the Federal Court. Counsel for the appellant argued that there was no material on record to show the qualification of the inquiry officer as prescribed by the proviso to s 5(1) of the Act. Neither was there any evidence to show that the inquiry officer carried out the investigation as required of him. Counsel thus submitted that there had been no compliance with the requirements of s 5 of the Act. The Federal Court had to inter alia consider whether there were defects in the inquiry officer's report which the Minister had to consider before making the detention order under s 6(1) of the Act; and if so whether the court could review the validity of the detention order. The Federal Court had also to consider, whether in the light of its earlier decision in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309, it could inquire into irregularities leading to the making of a detention order.

**Held**, allowing the appeal:

(1) In the instant case, no evidence had been tendered by the inquiry officer in

support of the role played by him. Neither was there any evidence to show that a claim to privilege had been made under s 14 of the Act to justify the non-production of such evidence. There was therefore an obligation on the respondents to produce such evidence as the appellant was entitled to it. The affidavit of the Deputy Minister of Internal Security: (i) merely stated that he had considered the report of the inquiry officer; (ii) did not reveal whether the inquiry officer had complied with the requirements of s 5 of the Act; (iii) did not reveal the conclusions of the inquiry officer under s 5(2) of the Act; and (iv) did not state the qualifications of the inquiry officer — resulting in a breach in relation to compliance with s 5 of the Act (see para 8).

(2) Section 11C(1) of the Act restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature (see para 15).

(3) The ratio decidendi in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 does not deal with defects in the making of a current detention order but with the illegality of a prior detention. It only rendered irrelevant defects in a prior detention when the current detention order was lawful. The challenge of the appellant in the instant case was not as to the validity of the prior arrest but as to the regularity of the current detention order in the light of defects in the procedure leading to the making of the order. The authority could not therefore be used as a shield to hide from procedural defects in the making of the current detention order (see para 16).

(4) The reports specified in s 6(1)(a) and (b) of the Act play a very significant role in the making of a detention order against a person. The Minister must consider these reports before making a detention order. They are therefore pre-conditions to the exercise of power under s 6(1) of the Act. They are part of the decision making process and not the decision itself. Thus, they amount to procedural requirements governing the exercise of discretion by the Minister in making a detention order within the meaning of s 11C of the Act. A breach of this requirement is therefore subject to judicial review (see para 16).

(5) The report of the inquiry officer that the Minister had to consider under s 6(1)(b) of the Act had to be one that satisfied the requirements of s 5 of the Act. Since there was no evidence of compliance with s 5 of the Act in this case, the report under s 6(1)(b) of the Act could not be said to have been made in accordance with law. Accordingly, the detention order made against the appellant could not be said to be one that had been validly made (see para 16).

**[Bahasa Malaysia summary**

Perayu telah ditangkap menurut s 3(1) Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta tersebut'). Timbalan Menteri Keselamatan Dalam Negeri berikutan itu telah mengeluarkan satu perintah tahanan terhadap perayu di bawah s 6(1) Akta tersebut. Perayu telah memfailkan satu writ habeas corpus tetapi ia telah ditolak oleh Mahkamah Tinggi. Perayu kemudian telah merayu ke Mahkamah Persekutuan. Peguam bagi pihak perayu berhujah bahawa tiada butir-butir atas rekod untuk menunjukkan kelayakan pegawai penyiasat seperti yang ditetapkan oleh proviso kepada s 5(1) Akta tersebut. Tiada juga keterangan untuk menunjukkan bahawa pegawai penyiasat telah menjalankan siasatan seperti yang dikehendaki olehnya. Peguam dengan itu berhujah bahawa terdapat ketidakpatuhan keperluan s 5 Akta tersebut. Mahkamah Persekutuan telah, antara lain, menimbangkan sama ada terdapat kecacatan dalam laporan pegawai penyiasat yang mana Menteri perlu pertimbangkan sebelum membuat perintah tahanan di bawah s 6(1) Akta tersebut, dan jika ya sama ada mahkamah perlu mengkaji semula kesahan perintah tahanan. Mahkamah Persekutuan juga perlu menimbangkan, sama ada berdasarkan keputusan sebelumnya dalam *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309, ia perlu menyiasat luar aturan dalam membuat perintah tahanan itu.

**Diputuskan**, membenarkan rayuan tersebut:

(1) Dalam kes semasa, tiada keterangan telah ditenderkan oleh pegawai penyiasat dalam menyokong peranan yang dimainkan olehnya. Tiada juga keterangan untuk menunjukkan bahawa tuntutan terhadap perlindungan telah dibuat di bawah s 14 Akta tersebut untuk menjustifikasikan keterangan yang tidak dikemukakan itu. Oleh itu terdapat obligasi atas responden-responden untuk mengemukakan keterangan tersebut sepertimana yang patut oleh perayu. Afidavit Timbalan Menteri Keselamatan Negeri: (i) hanya menyatakan bahawa beliau telah mempertimbangkan laporan pegawai penyiasat; (ii) tidak mengemukakan sama ada pegawai penyiasat telah mematuhi keperluan s 5 Akta tersebut; (iii) tidak mengemukakan keputusan pegawai penyiasat di bawah s 5(2) Akta tersebut; dan (iv) tidak menyatakan kelayakan pegawai penyiasat — yang mengakibatkan pelanggaran berkaitan pematuhan s 5 Akta tersebut (lihat perenggan 8).

(2) Seksyen 11C(1) Akta tersebut menyekat kajian semula kehakiman kepada hanya persoalan tentang pematuhan apa-apa keperluan prosedur yang mengawal apa-apa tindakan yang dilakukan atau keputusan yang dibuat oleh Yang di-Pertuan Agong atau Menteri dalam menggunakan kuasa budi bicara mereka. Ujiannya, oleh itu, dalam menentukan sama ada satu pelanggaran boleh tertakluk kepada kajian semula kehakiman adalah sama ada ia telah mematuhi mana-mana keperluan prosedur yang mengawal apa-apa tindakan atau keputusan yang dibuat oleh Yang di-Pertuan Agong atau Menteri dalam menggunakan kuasa budi bicara mereka menurut Akta tersebut tanpa perlu membuktikan apa-apa prejudis. Penentuan sedemikian dapat memudahkan, walaupun bukan muktamad, melalui satu pertimbangan tentang kesan

peruntukan statutori yang telah dilanggari, iaitu, sama ada ia bersifat mandatori atau arahan (lihat perenggan 15).

(3) Ratio decidendi dalam *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 tidak membincangkan tentang kecacatan dalam membuat suatu perintah tahanan semasa tetapi tentang kepenyalahan undang-undang tahanan sebelumnya. Ia hanya menyebabkan kecacatan tidak relevan dalam tahanan sebelumnya sedangkan perintah tahanan semasa adalah sah di sisi undang-undang. Cabaran perayu dalam kes semasa bukan tentang kesahan tangkapan sebelumnya tetapi tentang ketetapan perintah tahanan semasa berdasarkan kecacatan dalam prosedur yang menyebabkan perintah itu dibuat. Pihak berkuasa oleh itu tidak boleh digunakan sebagai perlindungan untuk bersembunyi daripada kecacatan prosedur dalam membuat perintah tahanan semasa (lihat perenggan 16).

(4) Laporan-laporan yang dinyatakan dalam s 6(1)(a) dan (b) Akta tersebut memainkan peranan penting dalam pembentukan perintah tahanan terhadap seseorang. Menteri perlu menimbangkan laporan-laporan tersebut sebelum membuat suatu perintah tahanan. Ianya pra syarat untuk menggunakan kuasa di bawah s 6(1) Akta tersebut. Ianya merupakan sebahagian daripada proses membuat keputusan dan bukan keputusan itu sahaja. Oleh itu, jumlah keperluan prosedur yang mengawal penggunaan budi bicara oleh Menteri dalam membuat suatu perintah tahanan dalam maksud s 11C Akta tersebut. Satu pelanggaran keperluan ini adalah tertakluk kepada kajian semula kehakiman (lihat perenggan 16).

(5) Laporan pegawai penyiasat bahawa Menteri perlu membuat pertimbangan di bawah s 6(1)(b) Akta tersebut hendaklah suatu yang memenuhi keperluan s 5 Akta tersebut. Memandangkan tiada keterangan berhubung pematuhan s 5 Akta dalam kes ini, laporan di bawah s 6(1)(b) Akta tersebut tidak boleh dikatakan telah dibuat menurut undang-undang. Sewajarnya, perintah tahanan yang dibuat terhadap perayu tidak boleh dikatakan suatu yang telah dibuat secara sah (lihat perenggan 16).]

**Notes**

For cases on Detention under Dangerous Drugs (Special Preventive Measures) Act 1985, see 10 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1299–1302.

**Cases referred to**

*Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65 (refd)
*Datuk James Wong Kim Min, Re* [1976] 2 MLJ 245 (refd)
*Inspector General of Police & Ors v Rajoo s/o Ramasamy* [1989] 1 MLJ 416 (refd)
*Low Teng Hai v Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 (refd)
*Munna Tuin v District Magistrate, Lucknow* 1982 Cr LJ 630 (refd)
*Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 (refd)
*Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 28 (refd)
*Reverend Thomas Pelham Dale's case, The* (1881) 6 QBD 376 (refd)

*Tan Boon Liat @ Allen & Anor, Re; Tan Boon Liat & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors;Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 (refd)

**Legislation referred to**

Dangerous Drugs (Special Preventive Measures) Act 1985 ss 3(1), 5(1), (2), (4), 6(1), 11C(1), 14
Federal Constitution art 5(2)

**Appeal from**: Criminal Application No MT1–44–13 of 2005 (High Court, Johor Bahru)

*RR Mahendran (R R Mahendran & Co) for the appellant.*
*Tengku Amir Zaki bin Tengku Hj Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.*

**Augustine Paul FCJ (delivering judgment of the court):**

**[1]** In *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309, this court held that a writ of habeas corpus must be directed against the current detention order when it has been made subsequent to a prior arrest and detention. Thus, any illegality in the prior arrest and detention cannot be the subject matter of inquiry. The critical issue that arose for determination in this appeal before us was whether such a result would also extend to any irregularities in the making of the current detention order. In other words, does it mean that any statutory pre-condition to the making or leading to the making of the current detention order cannot be inquired into just as in the case of irregularities in the prior arrest and detention?

**[2]** The appellant was arrested on 15 June 2004 pursuant to s 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act'). The Deputy Minister of Internal Security issued a detention order against the appellant on 13 August 2004 under s 6(1) of the Act. The writ of habeas corpus filed by the appellant on 11 March 2005 was dismissed by the High Court on 20 February 2006. This appeal is by the appellant. In order to appreciate the argument raised before us by both parties, it is necessary to reproduce some parts of the affidavits filed by them. Paragraph 6 of the affidavit affirmed by the Deputy Minister of Internal Security on 17 August 2005 reads as follows:

> Daripada laporan lengkap penyiasatan yang berkaitan dengan aktiviti pemohon yang telah saya terima daripada CIF INSPEKTOR ISMAIL BIN AHMAD iaitu Pegawai Penyiasat Polis di bawah s 3(3) Akta tersebut pada 26 Julai 2004 mengenai tangkapan dan penahanan pemohon dan juga laporan oleh ADNAN BIN YA'ACOB iaitu Pegawai Siasatan di bawah s 5(4) Akta tersebut pada 3 Ogos 2004, saya berpuashati bahawa pemohon pernah ada atau sedang ada kaitan dengan aktiviti pengedaran dadah berbahaya dan adalah perlu bagi ketenteraman awam supaya pemohon ditahan.

**[3]** In reply to this affidavit, the appellant affirmed an affidavit-in-reply on 1 September 2005. Paragraph 5 of this affidavit reads as follows:

> Saya merujuk kepada perenggan 6 Afidavit Responden Pertama dan sesungguhnya percaya bahawa pegawai siasatan di bawah s 5(4) Akta tersebut tidak layak menjadi pegawai siasatan di bawah s 5 Akta tersebut. Selebihnya pegawai siasatan tersebut tidak melaksanakan segala kewajiban dan tanggungjawab di bawah s 5 Akta tersebut, maka lapuran pegawai siasatan tidak lengkap dan tidak teratur. Responden Pertama telah mendasarkan Perintah Tahanan di bawah s 6(1) di atas lapuran pegawai siasatan yang defektif.

**[4]** The submission advanced by learned counsel before us stems from s 5 of the Act. It reads as follows:

> 5(1) There shall be appointed by the Minister in writing such number of inquiry officers as may be necessary for the purposes of this Act:
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> Provided that no police officer nor any person who is not legally qualified shall be appointed to be an inquiry officer.
>
> (2) Upon receiving the report under subsection (3) of section 3, the inquiry officer shall inquire whether there are reasonable grounds for believing that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs.
>
> (3) An inquiry officer may, in his discretion, for the purpose of subsection (2) —
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> (a) require the attendance before him of a person detained under section 3;
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> (b) procure and receive all such evidence, whether oral or in writing and whether the same be admissible or not under any written law for the time being in force relating to evidence or criminal procedure, which he may think necessary or desirable;
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> (c) summon and examine witnesses on oath or affirmation, and may for those purposes administer any oath or affirmation;
>
> (d) require the production of any document or other thing in his opinion relevant to the case.
>
> (4) An inquiry officer shall submit his report in writing to the Minister within such period as may be prescribed by the Minister by regulations made under this Act.

**[5]** Learned counsel argued that there is no material on record to show the qualification of the inquiry officer as prescribed by the proviso to s 5(1) of the Act. Neither was there any evidence to show that the inquiry officer carried out the investigation as required of him. He did not affirm any affidavit to explain the part played by him. In his reply, the learned Deputy Public Prosecutor said that paragraph 6 of the affidavit of the Deputy Minister of Internal Security shows that the inquiry officer had indeed prepared the report as required by s 5 of the Act. He added that in view of the judgment of this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia & Ors* [2006] 1 MLJ 309 any defect in the report of the inquiry officer or in his qualification is not a relevant matter for consideration.

**[6]** In substance the submission of learned counsel was that there has been no compliance with the requirements of s 5 of the Act. Section 6(1) of the Act states in

unmistakable terms that the Minister must consider, inter alia, the report of the inquiry officer before making the detention order. The report must be one that is prepared in accordance with the requirements of s 5 of the Act. It therefore becomes necessary to consider the duties and responsibilities of an inquiry officer. This was considered by the (then) Supreme Court in *Inspector General of Police & Ors v Rajoo s/o Ramasamy* [1989] 1 MLJ 416 where Abdul Hamid LP said at p 418:

> Fundamentally, the learned judge came to that conclusion on the strength of the words 'shall inquire' appearing in s 5(2). But where he went wrong was that he completely omitted to consider the opening words of sub-s (3) which reads:
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> > An inquiry officer may, in his discretion, for the purpose of sub-s 2 —
> >
> > (a) require …
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> These words were crucial to a proper interpretation of the meaning of 'inquiry' under s 5(2) of the Act.
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> If the learned judge had given due regard to these words, he would not, in our view, have come to the conclusion that he did. The language used in s 5 of the Act is crystal clear.
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> In our view, the words used in sub-s (2) read in the light of the whole of sub-s (3) make it abundantly clear that discretion rests with the inquiry officer. It is for the inquiry officer in a particular case to decide whether to exercise any of the powers. In other words it is for the inquiry officer to decide whether, for the purpose of the inquiry, to invoke any of the powers in the relevant paragraphs. Whether there is a need to do so would depend primarily on whether, having regard to the complete report submitted to him by the police investigating officer and on the materials submitted, he could be satisfied there were reasonable grounds to found his belief. If any inquiry officer is satisfied, after examining and considering the materials contained in the complete report, that there are reasonable grounds for believing that such person has been or is associated with trafficking activities, the need to call any witness or to procure any document does not arise. It is therefore only in cases where the inquiry officer, on the materials contained in the report submitted to him, is unable to satisfy himself that there are reasonable grounds to found his belief that such person is associated in trafficking activities, that the need to exercise his discretion arises. It would perhaps be proper to say that he ought to exercise the discretion if it is only by so doing that he can properly decide.
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> In our judgment, therefore, the learned judge erred in law in holding that it is imperative for the inquiry officer to invoke the powers contained in the relevant paragraphs to constitute a valid inquiry under sub-s (2) of s 5 of the Act. The duty is that of the inquiry officer to be satisfied that there are reasonable grounds for believing that the person has been or is associated with trafficking activities. In carrying out his duty he has a discretion whether or not to call witnesses. And it is not mandatory that he should invoke the powers contained in sub-s (3) of s 5 of the Act.

[7] It is clear from the above passage that it is not mandatory for the inquiry officer to carry out an inquiry under s 5 of the Act. It is for him to decide whether to exercise any of the powers in s 5 of the Act. However, the result of his inquiry as spelt out in s 5(2) of the Act must be in a report as stipulated in s 5(4) of the Act. In *Munna Tuin v District Magistrate, Lucknow* 1982 Cr LJ 630, it was held that failure to supply the inquiry report on which reliance was placed by the detaining authority to the detainee was fatal. The need for this becomes particularly significant in this case in view of the objection raised by learned counsel. Thus there must be evidence on

record to show that the inquiry officer had complied with the requirements of section 5 of the Act. The evidence of the inquiry officer could be in the form of an affidavit affirmed by him or by the production of his report itself. The disclosure of such evidence is, of course, subject to s 14 of the Act. In that event, a statement by the Minister that he had considered the report of the duly appointed inquiry officer would be sufficient.

**[8]** In this case, no evidence has been tendered by the inquiry officer in support of the role played by him. Neither is there any evidence to show that a claim to privilege has been made under s 14 of the Act to justify the non-production of such evidence. There is therefore an obligation on the respondents to produce such evidence as the appellant is entitled to it. Paragraph 6 of the affidavit of the Deputy Minister of Internal Security reproduced earlier merely states that he considered the report of the inquiry officer. It does not reveal whether the inquiry officer had complied with the requirements of s 5 of the Act and, in particular, his conclusion under s 5(2) of the Act. His conclusion will be very significant as it would certainly play a critical role in the decision to be made by the Minister as he is an independent person with a legal background. Similarly, paragraph 6 of the affidavit of the Deputy Minister of Internal Security also does not state the qualifications of the inquiry officer. The requirement under s 5(1) of the Act for the inquiry officer to be a non-police officer who is legally qualified is to ensure that the person who conducts the inquiry is one who is independent and has sufficient knowledge of the law to prepare a proper report for consideration by the Minister. Again there is no evidence on record to show compliance with this requirement. There is therefore a breach in relation to compliance with s 5 of the Act.

**[9]** The resultant matter for consideration is whether the breach is subject to judicial review. The detention order against the Appellant was issued by the Deputy Minister of Internal Security pursuant to s 6(1) of the Act which reads as follows:

> 6(1) Whenever the Minister, after considering —
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> (a) the complete report of investigation submitted under subsection (3) of section 3; and
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> (b) the report of the inquiry officer submitted under subsection (4) of section 5,
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> is satisfied with respect to any person that such person has been or is associated with any activity relating to or involving the trafficking in dangerous drugs, the Minister may, if he is satisfied that it is necessary in the interest of public order that such person be detained, by order (hereinafter referred to as a 'detention order') direct that such person be detained for a period not exceeding two years.

**[10]** It is manifestly patent that the Minister may make a detention order under s 6(1) of the Act only when he is satisfied of the need to do so after he had considered the two reports specified in s 6(1)(a) and (b) of the Act. What now requires to be addressed is the power of the court to review the validity of a detention order issued under s 6(1) of the Act when there are defects in the reports that the Minister must consider before making the order.

**[11]** The very object of a writ of habeas corpus is to secure the release of a person who has been unlawfully detained. This would as of necessity require a consideration by the court of the lawfulness or otherwise of a detention. As a matter of fact, this power of the court is enshrined in art 5(2) of the Federal Constitution which reads as follows:

> Where complaint is made to a High Court or any judge thereof that a person is being unlawfully detained the court shall inquire into the complaint and, unless satisfied that the detention is lawful, shall order him to be produced before the court and release him.

**[12]** Needless to say, the lawfulness of a detention would be dependent on the law in force from time to time. In dealing with the duty of the Court in cases of preventive detention Lee Hun Hoe CJ (Borneo) said in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 at p 251:

> Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguard that is provided by law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty. See *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184.
>
> One of the functions of the courts is to interpret the law. An inherent part of their function is to see that the executive acts within the law and does not encroach unnecessarily into the realm of liberty of the subject. In fact, art 5(1) of the Constitution guarantees that 'no person shall be deprived of his … liberty except in accordance with the law.' If this constitutional guarantee is to have any real meaning at all, then it is imperative that the courts should intervene whenever the liberty of the subject is encroached upon not in accordance with the law.

**[13]** Further reference may be made to *Re Tan Boon Liat @ Allen & Anor; Tan Boon Liat & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors; Chuah Han Mow v Menteri Hal Ehwal Dalam Negeri & Ors;Subramaniam v Menteri Hal Ehwal Dalam Negeri & Ors* [1977] 2 MLJ 108 where Lee Hun Hoe CJ (Borneo) said at p 110–111:

> In *The Reverend Thomas Pelham Dale's Case* (1881) 6 QBD 376, 461, 469 and 470 Brett LJ observed at p 461 that:
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> > Then comes the question upon the habeas corpus. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity the court will not allow the imprisonment to continue.
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> Cotton LJ in supporting this stated at p 469:

> I quite agree with Brett LJ, that when persons take upon themselves to cause another to be imprisoned, they must strictly follow the powers under which they are assuming to act, and if they do not, the person imprisoned may be discharged, although the particulars in which they have failed to follow those powers may be matters of mere form. Here, however, the departure from the correct procedure is not, in my opinion, a mere matter of form, but is a matter of substance.

**[14]** It follows that if a detention is procured by steps which are not regular the court is empowered to set aside the detention order. It means that every step which is necessary for the making of a detention order is subject to review by the court. The effect of a breach of such procedural requirements had been considered in a number of cases. See, for example, *Puvaneswaran v Menteri Hal Ehwal Dalam Negeri Malaysia & Anor* [1991] 3 MLJ 28; *Low Teng Hai v Menteri Dalam Negeri, Malaysia & Others* [1992] 2 CLJ (Rep) 816 and *Aw Ngoh Leang v Inspector General of Police & Ors* [1993] 1 MLJ 65. It has been recognised in these cases that a procedural requirement may be mandatory or directory. A mandatory requirement is one that goes to the root of the matter and is of direct relevance to the detention order. The breach of a mandatory requirement will render the detention order invalid without the need to establish any prejudice. The breach of a procedural requirement which is directory will not be significant provided that there is substantial compliance with the rules with no prejudice having been suffered by the detainee. However, it must be observed that the power of the court to intervene is limited to only matters of compliance with procedural requirements by s 11C(1) of the Act which reads as follows:

> There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

**[15]** It is clear that the section restricts judicial review to only questions on compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power. Such procedural requirements can only be ones that will go to the root of the matter and be of direct relevance to the making of the detention order. The section only refers to a question of compliance with procedural requirements without subjecting it to any prejudice having been suffered. The test, therefore, in determining whether a breach can be subjected to judicial review is whether it is in compliance with any procedural requirement governing any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with the Act without the need to establish any prejudice. Such a determination will be greatly facilitated, though not decisively, by a consideration of the effect of the statutory provision that has been breached, that is to say, whether it is mandatory or directory in nature.

**[16]** It must be reiterated that the reports that the Minister must consider are only a prerequisite to the making of a detention order under s 6(1) of the Act. Accordingly,

the short answer to the reliance of the learned Deputy Public Prosecutor on the judgment of this court in *Mohd Faizal bin Haris v Timbalan Menteri Dalam Negeri, Malaysia and Others* [2006] 1 MLJ 309 is that the ratio decidendi of that case does not deal with defects in the making of the current detention order but with the illegality of the prior detention. Thus it only renders irrelevant defects in a prior detention when the current detention order is lawful. The challenge of the appellant in this case is not as to the validity of the prior arrest but as to the regularity of the current detention order in the light of defects in the procedure leading to the making of the order. The authority relied on cannot therefore be used as a shield to hide from procedural defects in the making of the current detention order. The reports specified in s 6(1)(a) and (b) of the Act play a very significant role in the making of a detention order against a person. The Minister must consider these reports before making a detention order. They are therefore pre-conditions to the exercise of power under s 6(1) of the Act. They are part of the decision making process and not the decision itself. Thus they amount to procedural requirements governing the exercise of discretion by the Minister in making a detention order within the meaning of s 11C of the Act. A breach of this requirement is therefore subject to judicial review. The case of *The Reverend Thomas Pelham Dale's case* (1881) 6 QBD 376 cited in *Re Tan Boon Liat* referred to earlier makes it clear that the steps taken to detain a person must be entirely regular. Thus, if a report must be considered before making a detention order it must be one that is in regular form. It follows that the report of the inquiry officer that the Minister must consider under s 6(1)(b) of the Act must be one that has satisfied the requirements of s 5 of the Act. Since there is no evidence of compliance with s 5 of the Act in this case the report under s 6(1)(b) of the Act cannot be said to have been made in accordance with law. Accordingly, the detention order made against the appellant cannot be said to be one that has been validly made.

**[17]** In the upshot, we allowed the appeal by the appellant.

*Appeal allowed.*

Reported by John Paul Simon